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No.:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CROSTHWAIT EQUIPMENT COMPANY, INC., A. CURTIS CROSTHWAIT, JR., ALLEN E. CROSTHWAIT and RUTH CROSTHWAIT,

Petitioners,

VERSUS

JOHN DEERE COMPANY,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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## QUESTIONS PRESENTED

1. Is the United States Constitution's Seventh Amendment right to trial by jury violated when the district judge balances the evidence of non-movant and movant to determine whether to grant judgment as a matter of law?

2. In determining whether to grant a judgment as a matter of law, should the district judge balance all the evidence, or should the district judge determine whether any evidence supports the verdict?

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## OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 992 F. 2d 525 (5th Cir. 1993). It is attached as an Appendix.

## JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on June 4, 1993, with Petition for Rehearing denied June 30, 1993.

This Court has jurisdiction to review by a Writ of Certiorari under 28 USC Section 1254.

## CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is United States Constitution Amendment Seven, which says:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law."

## STATEMENT OF THE CASE

Petitioners, former franchisees of the John Deere Company, obtained a $3.4 million jury verdict against John Deere Company for acting in bad faith in terminating their franchise. The district court, applying *Boeing Co. v. Shipman*, 411 F. 2d 365 (5th Cir. 1969), determined that under "all the evidence" the facts pointed "so strongly and overwhelmingly" in favor of John Deere, that judgment as a matter of law should be entered in John Deere's favor. The United States Court of Appeals for the Fifth Circuit agreed. 992 F. 2d 525 (5th Cir. 1993). Because the

Fifth Circuit's permitting the trial court to weigh all the evidence, instead of determining whether any evidence supported the verdict, is inconsistent with the practice in other circuits, Petitioners request review.

This suit was filed on June 7, 1990 by Petitioners, franchisees of John Deere in Houston, Mississippi since 1955. R., Vol. 1, pp. 1-45. The Complaint alleges that John Deere breached the franchise contract by terminating their dealership because Petitioners had invaded the assigned territories of other John Deere franchisees. R., Vol. 5, pp. 1149-1157. Respondent answered, claiming that the franchise was actually terminated because of Petitioners' fraud. R., Vol. 5, pp. 1158- 1195. The district court determined that Mississippi law implies a "duty of good faith and fair dealing" and that terminating Petitioners because they had invaded the territory of other dealers by charging lower prices would violate this duty. Memorandum Opinion, R., Vol. 10 pp. 2173-2174. Accordingly, the trial court determined that a jury should decide the issue of the reason for

the termination. In words of the trial court:

> "In short, if the jury finds that John Deere terminated the dealership because of the falsifications and not because of an unlawful motive, then Plaintiff's breach of contract naturally will fail because John Deere clearly had the contractual right to terminate when Crosthwait Equipment falsified documents it had tendered to Deere. However, if the jury finds that John Deere terminated the dealership because of an unlawful motive, such would likely constitute a breach of the duty of good faith and fair dealing. See *OMP v. Security Pacific Business Finance Inc.*, 716 F. Supp. 239, 249 (N.D. Miss. 1988)."

Memorandum Opinion, R., Vol. 10, pp. 2173-2174.

A two week trial then commenced to determine the factual issue of the reasons for Petitioners' termination. John Deere introduced much evidence that it justifiably terminated the dealership because the Petitioners had submitted numerous financing contracts containing false statements as to the amount of down payments, identity of equipment taken as a trade in, and a changed serial number on a tractor. Tr. 850, 1953, 1519-20 1821, 1823-24, 1845-52, 1470-75, 1478-80, 1482-91, 1491-99, 1649-50, 1667-69, 1685-86. John Deere claimed it had

discovered the fraudulent practices in a 1990 audit, which it conducted after it had begun receiving information that Petitioners were submitting false or misleading documents. Tr. 495-497, 507-509. According to John Deere, the chief source of the information of fraud was Toby Dexter, a former business partner of Allen Crosthwait Tr. 883-885, 1818-1829.

On the other hand, according to Petitioners' proof, the audit's disclosure of "fraudulent" practices was not the real reason for the termination. Indeed, the audit itself was begun, not because of Dexter's complaints, but because of competitors' complaints that Petitioners were invading their territories and cutting prices. Tr., 76-78. Petitioners' strongest proof was an internal John Deere memorandum, which read, in part:

> "Besides the financial risk involved with staying in business with a known lying thief, what they are doing to our surrounding J.D. Dealers, goes directly against our 'Best Dealer in Town' campaign. They are destroying dealer margins, wrecking havoc with customer relations and committing grievous business infractions. Not only will they never become the best dealer for us in Houston, Mississippi, they did not deserve the further opportunity to do so. Trying to force guidelines on them will only prolong the eventual cure, which is to stop doing business with them...."

> "One such topic was the 'word' on the street that he (Crosthwait) had a Lamar Johnson in his employ who was selling equipment out of Batesville, Mississippi for him at prices approaching the low volume...."

Plaintiff's Exhibit 1.

Further, Don Holcomb, one of the members of the John Deere committee who voted to terminate Petitioners' franchise, admitted that, in making his termination vote, he relied, at least in part, upon the concern with "dealer relations". Tr., 371-372.

Petitioners also attacked Deere's evidence that the termination was the result of complaints by former partner, Toby Dexter. Al Steinback, a Deere agent, admitted that the reason for the audit was complaints from other dealers about Crosthwait, not Dexter's complaints. Tr. 76-77, 88. In fact, Dexter's complaints, including his complaints about a switched serial number, had been known for two years before the "audit". Tr., 495-496, 477, 481, 892-893. Petitioners' claim that their "fraud" was not the real reason for the termination was supported by evidence that John Deere had never terminated a dealer for such a reason, Tr. 559, and that John Deere was aware

of numerous other dealers who had committed equally serious transgressions, such as inflated down payments, and misrepresented trade-ins. Tr., 526-527, 410, 1784. Failure of dealers to accurately reflect down payments had become so common that John Deere actually had a box on its printed repossession form to indicate whether the down payment had been made. Tr., 1455, 1456.

Petitioners denied that any of the false entries were intentional or made for the purpose of injuring John Deere. Tr., 584-599. Petitioners gave a detailed description of each of the discrepancies and refuted Deere's claims that fraud was involved in any of them. Tr., 974-1047.

The jury accepted Petitioners' view of the evidence, finding John Deere had terminated the franchise for bad faith conduct -- cutting into dealer margins -- rather than for fraud. It returned a verdict totalling $3.4 million in damages against John Deere. R., Vol. 11, pp. 2442, 2443.

The District Judge, however, found that the evidence was so

overwhelming in favor of John Deere, that the verdict should be set aside, and judgment entered for John Deere. The District Court wrote:

"The Court is further of the opinion that the Crosthwait Equipment Company, Inc.'s averments as to retaliation by John Deere Company relative to its motivation concerning Crosthwait's selling outside of its territory and cutting into other dealer margins was not supported by the evidence in this case. The Court does not believe that the notation in the Everett memo that Crosthwait was 'destroying other dealer margins' raised a jury issue that would support the Petitioners' theory of the case. It is noted that the *Boeing* case specifically provides that a mere scintilla of evidence will not suffice to make a jury issue. *Boeing*, 411 F. 2d at 374. There must be a substantial conflict in the evidence to constitute a jury issue. It is the opinion of this court that the only logical construction of the evidence in the case sub judice after a review of all of the evidence, is that the falsification of the numerous credit documents was an act of default and that the dealership was lawfully terminated by John Deere Company."

Tr., 2496.

Relying on its authoritative decision in *Boeing v. Shipman*, 411 F. 2d 365, 374-75 (5th Cir. 1969), the Fifth Circuit agreed, holding that considering "all the evidence", the jury should have returned its verdict for John Deere, and affirming the District Judge. 992 F. 2d at 525. The Crosthwaits petitioned the Fifth

Circuit for rehearing, pointing to a number of factual errors in the Fifth Circuit opinion, ranging from such matters as the relationship between the parties, the chronological order of events between the audit and the complaints by Dexter and the Fifth Circuit's ignoring the evidence favoring Petitioners, while emphasizing the evidence in John Deere's favor. Petitioners argued that the net result of the Fifth Circuit's weighing the conflicting testimony between Plaintiffs and Defendants, and the Court's making its own causation determination was to deprive Petitioners of their "constitutional right to a jury trial".

On June 30, 1993, the Fifth Circuit denied the Petition for Rehearing without opinion.

## ARGUMENT

BY WEIGHING ALL OF THE EVIDENCE AND DECIDING THAT THE EVIDENCE OF JOHN DEERE WAS MORE CREDIBLE AND OUTWEIGHED THAT OF PETITIONERS, THE FIFTH CIRCUIT DENIED PETITIONERS' CONSTITUTIONAL RIGHT OF TRIAL BY JURY. INSTEAD OF WEIGHING ALL OF THE EVIDENCE, THE FIFTH CIRCUIT SHOULD HAVE UTILIZED THE TEST ADOPTED BY THE EIGHTH CIRCUIT, AND CONSIDERED ONLY WHETHER THERE WAS ANY

EVIDENCE TO SUPPORT THE VERDICT.

Applying its decision in *Boeing v. Shipman*, 411 F. 2d 365, 374-375 (5th Cir. 1969), the Court of Appeals determined that the jury should have ruled for John Deere on the grounds that the "overwhelming" evidence was that "fraud", not a desire to stifle competition, was the reason for the termination.

The Fifth Circuit's weighing of all the evidence, rather than determining only whether any evidence supported the verdict, is contrary to the rule in other Circuits. Dissenting from this Court's denial of certiorari in *Venture Technology, Inc. v. National Fuel Gas Distribution Corp.*, 459 U. S. 1007, 74 L. Ed. 2d 398, 103 S. Ct. 362, Justice White describes the conflict in the circuits:

> "... [I]t is the Second Circuit's practice to examine all of the evidence in a manner most favorable to the non-moving party. This is also the position of at least the Fifth and Seventh Circuits. *Boeing v. Shipman*, 411 F. 2d 365, 374-75 (5th Cir. 1969); *Panter v. Marshall Field & Co.*, 646 F. 2d 271, 281-282 (7th Cir. 1981). In the Eighth Circuit, however, it appears thatonly evidence which supportsthe verdict winner is to be considered. *Simpson v. Skelly Oil Co.*, 371 F. 2d 563 (8th Cir. 1967). The First and Third Circuits follow a middle ground: the reviewing court may

> consider uncontradicted, unimpeached evidence from disinterested witnesses. *Layne v. Vinzant*, 657 F. 2d 468, 472 (1st Cir. 1981); *Inventive Music, Ltd. v. Cohen*, 617 F. 2d 29, 33(3d Cir. 1980). Thus, the federal courts of appeals follow three different approaches to determining whether evidence is sufficient to create a jury issue."

The conflict between the circuits is demonstrated by many cases in addition to those cited by Justice White. A recent pronouncement from the Eighth Circuit on the issue, *Caudill v. Farmland Industries, Inc.*, 919 F. 2d 83, 86 (8th Cir. 1990), contrasts with that of the Fifth Circuit:

> "Generally, only evidence favoring the non-moving party should be considered. *Dace v. ACF Industries, Ind.*, 722 F. 2d 374, 376 (8th Cir. 1983). As we stated in *Dace*, however, '[t]here may be particular situations in which the rules should not be rigidly applied. If, for example, the moving party's evidence is completely disinterested, uncontradicted, and unimpeached..., some modification of the general rule may be called for.'"

Many other cases have also rejected the Fifth Circuit's "all of the evidence" test in favor of the test which permits consideration of whether any evidence supports the verdict. See, for example, *Casko v. Elgin,Joliet and Eastern Ry. Co.*, 361 F. 2d 748, 749 (7th Cir. 1966); *Lyons v. J.C. Penney Co.*, 316 F.

2d 753 (7th Cir. 1963); *Simpson v. Skelly Oil Co.*, 371 F. 2d 563 (8th Cir 1967); *Kingston v. McGrath*, 232 F. 2d 495 (9th Cir. 1956). See also Judge Rivers' dissent in *Boeing v. Shipman*, 411 F. 2d 365, 381-82 (5th Cir. 1961), arguing that consideration of all the evidence is inconsistent with this Court's precedents.

The fundamental conflict on the proper standard is explained in Johnston, "Jury Subordination Through Judicial Control", 43 Law and Contemporary Problems at 30-31:

> "Although the cases articulate multiple standards for testing the sufficiency of the evidence, for purposes of analysis, the standards fall under two categories. The method of application of the standard is far more important than the language of the standard. The first category favors the jury relative to the trial judge. It requires isolation and identification of the facts on which the judge tests the sufficiency of the evidence. It excludes any attempt at weighing the evidence. The standard, in its simplest form is whether 'any evidence' supports the verdict. A restatement of the standard is that it considers only the facts favorable to the verdict winner. According to Justice Black, it closely approximates the standards of the common law demurrer to the evidence. To the extent that it favors the jury, the any evidence standards reflects the concerns that prompted the adoption of the Seventh Amendment. The second category favors the trial judge relative to the jury. It does not require clear isolation and identification of the facts; rather, it views the evidence pervasively and allows the trial judge to weigh it. This standard instructs the trial judge to decide if there is

substantial evidence to support the verdict or if the verdict loser's evidence 'overwhelmed' the verdict winner's evidence.

Another distinction between the two categories is the evidence from which the facts used to test sufficiency are drawn. The any evidence standard most appropriately addresses the evidence adduced in the chief aspects of the Plaintiffs' case. If, at the close of its case, the Plaintiff has any evidence which satisfies the standard, that evidence also satisfies the standard at the close of the Defendant's case. The any evidence standard then addresses whether Plaintiff established a prima facie case. If a prima facie case is made, the any evidence standard precludes a directed verdict at both the close of the Plaintiff's case and the Defendant's case. The overwhelming evidence standard most appropriately addresses the evidence adduced by both the Plaintiff and the Defendant. Even if the Plaintiff, at the close of the case, has some evidence, that evidence may later be overwhelmed by the Defendant's evidence."

Professor Johnston concludes that the "any evidence" standard is most faithful to the Seventh Amendment:

"Even considering its impact on modern litigation, the historical context and development of the constitutional right to jury trial, which cannot be ignored entirely, favors the any evidence standard. The any evidence standard clearly favors the jury as the principal decision maker. The Court's control over the jury by taking the case from the jury or overturning a jury's verdict is reduced to a minimum by the any evidence standard. The concern about 'run away' juries is unrealistic in view of the other devices such as new trials. In addition, the any evidence standard provides a degree of certainty by requiring isolation and identification of the facts to which the standard is applied. It permits the

> lawyers to predict reasonably the outcome of litigation in order to plan strategy and tactics. It simply avoids transferring the cloak of secrecy from the jury's deliberations to the judge's decision-making. Thus, both history and the modern litigative process suggest the any evidence standard is the best remedy."

Other commentators who agree with Professor Johnston that considering only non-movant's evidence is more consistent with the Seventh Amendment are 2B *W. Barrow & Holtzoff*, Sec. 1075 at 399-400, and Bagalay, *Directed Verdicts and the Right to Trial in Federal Courts*, 42 Tex. L. Rev. 1053, 1061 (1964).

In addition to the conflict between the circuits on the general standards to apply in deciding whether to grant judgment as a matter of law, there is also a conflict among the circuits in cases with facts almost precisely like these. Justice White also described this disagreement in his dissent in *Venture Technology, supra:*

> "[The Second Circuit] stated that 'even where a termination follows the receipt of complaints from wholesalers or agents, there is no basis for inferring the existence of concerted action absent some evidence of a tacit understanding or agreement with them.' *Schwimmer*, 677 F. 2d 946, 953 (2d Cir. 1982):.... This view of the evidence necessary to create a jury question under the Sherman Act is

> shared by the Third Circuit.... The Seventh and Eighth Circuits, however, clearly reject this position. *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F. 2d 1226 (7th Cir. 1982); *Battle v. Lubrizol Corp.*, 673 F. 2d 984 (8th Cir. 1982). Because illegal conspiracies can rarely be proved through evidence of explicit agreement, but must usually be established through inferences from the conduct of the alleged conspirators, the disagreement in the Circuits in the nature of proof required is especially significant."

In this case, had the Court applied the standard of the Seventh and Eighth Circuits, there would have been sufficient evidence to make a jury verdict. *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F. 2d 1226:

> "We believe... that proof of termination following competitor complaints is sufficient to support an inference of concerted action. In *Battle v. Lubrizol Corp.*, 673 F. 2d 984 (8th Cir. 1982), the Eighth Circuit declined to follow *Sweeney*, and held 'that proof of dealer's complaints to the manufacturer about a competitor dealer's price cutting and the manufacturer's action in response to such complaints would be sufficient to raise an inference of concerted action.'...We agree."

Here, Petitioners produced evidence that the termination was preceded by competitor complaints. Had this case been tried in the Eighth or Seventh Circuits, this would have been enough to create a jury issue. The fact that there was actually an internal

memorandum pointing to the competitor complaints about "cutting dealer margins", in itself, would have insured that this case survived a motion for directed verdict in the Seventh or Eighth Circuits. The fact that it would not survive such a motion in the Fifth Circuit highlights the conflict among the circuits under facts such as these. The Fifth Circuit's finding that the memorandum was only a "scintilla" of evidence, and not sufficient to create a jury issue underscores the Fifth Circuit's view that a district judge may decide the weight to give evidence.

## CONCLUSION

The conflict between the circuits is clear and is based upon fundamental differences between federal judges as to the requirements of the Seventh Amendment. To resolve this conflict, certiorari should be granted.

Respectfully submitted,

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DATED: September 22, 1993

No.:

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CROSTHWAIT EQUIPMENT COMPANY, INC., A. CURTIS CROSTHWAIT, JR., ALLEN E. CROSTHWAIT and RUTH CROSTHWAIT,

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**APPENDIX A**

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CROSTHWAIT EQUIPMENT CO., INC., et. al., Plaintiffs,

Crosthwait Equipment Company, Inc., A. Curtis Crosthwait, Jr., and Ruth A. Crosthwait, Plaintiffs- Counter Defendants-Appellants, Cross Appellees,

and

Allen E. Crosthwait, Plaintiff- Appellant,

v

JOHN DEERE COMPANY,

et al., Defendants,

John Deere Company, Defendant- Counter Claimant- Appellee, Cross Appellant.

No. 7181.

United States Court of Appeals, Fifth Circuit.

June 4, 1993

Agricultural equipment dealer brought action in state court against equipment company for breach of contract, breach of fiduciary duty, intentional infliction of emotional distress, and intentional interference with contract. Company removed action to federal court. Company counterclaimed for damages on account balance due. The United States District Court for the Northern District of Mississippi, Glen H. Davidson, J., entered

judgment as matter of law for company following jury verdict for dealer, and denied company's motion for judgment as matter of law on its counterclaim. Dealer appealed and company cross-appealed. The Court of Appeals, Cobb, District Judge, sitting by designation, held that: (1) company lawfully terminated dealership agreement for submission of fraudulent sales and credit contracts; (2) assuming that Mississippi franchise cancellation statute applied, termination of agreement did not violate 90- day notice provision of that statute; and (3) company was entitled to recover damages.

Affirmed in part; reversed and remanded in part.

**1. Federal Courts Key 765**

Court of Appeals uses same standard of review that guided trial court in its ruling on motion for judgment as matter of law.

**2. Federal Civil Procedure Key 2609**

In ruling on motion for judgment as matter of law, all evidence with all reasonable inferences is considered in light most favorable to party opposed to motion.

**3. Federal Courts Key 765**

In reviewing ruling on motion for judgment as matter of law, if facts and inferences point so strongly and overwhelmingly in favor of one party that Court of Appeals believes that reasonable jurors could not arrive at contrary verdict, motion was properly granted; if there is substantial evidence opposed to motion, that i.s., evidence of such quality that reasonable and fair-minded jurors in exercise of impartial judgment might have reached different conclusions, motion should have been denied.

**4. FraudKey 58 (1)**

To prove fraud under Mississippi law, plaintiff has burden of

showing by clear and convincing evidence that defendant knowingly made false, material representations to plaintiff which defendant intended to induce actin on part of plaintiff in manner reasonably contemplated, that plaintiff did not know falsity of defendant's representations, that plaintiff relied upon truth of representations, that plaintiff had right to do so, and that plaintiff suffered consequent and proximate injury.

**5. Contracts Key 217**

Agricultural equipment company lawfully terminated dealership agreement as dealer submitted fraudulent sales and credit documents to equipment company; dealer's customers needed favorable financial data before company would approve credit they needed to finance purchases, dealer admitted that it submitted documents to company which contained false credit information which customers did not supply or create, company relied on that false information and was, therefore, ignorant of customers' true creditworthiness, company suffered at least $2,000 in damages and would have suffered more were it not for honesty of customers, and dealership agreement gave company right to cancel agreement for falsification of records, contracts, or other documents.

**6. Contracts Key 323(1)**

Notation by agricultural equipment company employee on interoffice memo was not sufficient to raise jury issue as to whether company cancelled dealership agreement in retaliation for dealer's selling outside its designated area, rather than for falsification of sales and credit documents.

**7. Damages Key 56**
**Torts Key 12**

Under Mississippi law, agricultural equipment dealer could not recover for intentional infliction of emotional distress or

intentional interference with contract in connection with equipment company's termination of dealership agreement as company lawfully terminated agreement for falsification of sales and credit documents.

**8. Trade Regulation Key 871(3)**

Even if relationship between agricultural equipment company and its dealer was franchise relationship, company did not violate 90- day notice provision of Mississippi franchise cancellation statute in terminating dealership agreement; company terminated dealer for having submitted fraudulent sales and credit contracts and dealer was allowed by trial court to continue day-to-day operations for 90 days after it was notified that it was being terminated. Miss. Code 1972, § 75-24-51(6).

**9. Federal Civil Procedure Key 2341, 2603**

Under Mississippi law, trial court erred in denying agricultural equipment company's motion for judgment as matter of law or new trial as to equipment dealer's liability for actual damages arising from dealer's falsification of sales and credit contracts; there was uncontradicted evidence of losses sustained, trial court failed to distinguish between disputed and undisputed debts, and specific amounts were question of fact.

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Appeal from the United States District Court for the Northern District of Mississippi.

Before KING and EMILIO M. GARZA, Circuit Judges, and

COBB[1], District Judge.

COBB, District Judge:

After a jury verdict was returned for the plaintiffs, the district court granted defendant's motion for judgment as a matter of law on the verdict and denied defendant's motion for judgment or a new trial on its counterclaim for damages. Plaintiffs appeal; defendants cross-appeal as to damages. For the reasons given below, we AFFIRMthe district court's order granting defendant's motion for judgment as a matter of law, and REVERSE and REMAND for further proceedings as to damages.

I.

Allen and Ruth Crosthwait, with their son A. Curtis Crosthwait Junior, owned and operated Crosthwait Equipment Co., Inc., (collectively, Crosthwait), an authorized John Deere dealership selling agricultural and consumer products and equipment. In 1988, John Deere Company, (Deere), received in information indicating that Crosthwait had prepared and submitted to Deere and its affiliate, Deere Credit Services, Inc., sales and credit documents containing material, false representations. In March 1990, after numerous reports of fraudulent activities, several Deere employees discussed the need to investigate Crosthwait's business practices. This resulted in a field audit of sales and credit documents prepared by Crosthwait. The audit led John Deere to terminate Crosthwait's dealership, based on fraudulent sales and credit documents, and pursuant to its dealership agreements with Crosthwait.

1. District Judge of the Eastern District of Texas, sitting by designation.

court granted defendant's motion for judgment as a matter of law on the verdict and denied defendant's motion for judgment or a new trial on its counterclaim for damages. Plaintiffs appeal; defendants cross-appeal as to damages. For the reasons given below, we AFFIRM the district court's order granting defendant's motion for judgment as a matter of law,and REVERSE and REMAND for further proceedings as to damages.

Crosthwait filed suit in state court for breach of contract and breach of fiduciary duty. Upon removal, the district court ordered that Crosthwait could stay in business for ninety days under Mississippi law.[2] During this period, Crosthwait amended its petition to include intentional infliction of emotional distress, alleging undue pressure to sign a closure agreement to avoid litigation; and intentional interference with prospective and existing contractual sales, in that Deere removed certin tractors that Crosthwait had or could have sold during the ninety-day period. Deere counterclaimed for damages on the account balance due.

At trial, twenty-one former customers testified without contradiction that numerous sales and credit documents bearing their names and submitted to Deere or Deere Credit Services contained falsifications regarding various transactions between the dealership and them. Crosthwait inflated down payments, incorrectly recorded purchase prices, and listed fictitious equipment as trade-ins. Uncontroverted evidence indicated that serial numbers were tampered with and in some instances exchanged from one piece of equipment to another. Allen Crosthwait himself testified that he submitted falsified sales and credit documents to Deere and its affiliate.

Crosthwait argued that such practices had long been known to Deere and, in fact, constituted standard practice in the business that was not material enough to warrant cancellation of his dealership.[3] He further claimed that Deere's audit was a

2. Miss. Code Ann. § 75-24-51 (6) (1072)
prospective and existing contractual sales, in that Deere
removed tractors that Crosthwait had or could have sold during the ninety-day period. Deere counterclaimed for damages on the account balance due.

3. Crosthwait cites deposition testimony of several witnesses which claimed that no other dealership had been cancelled for those reasons, a standard form containing a box to indicate whether or not the purchase price was actually made as represented, and the testimony of several employees that they were aware that misrepresentations happened.

sham, the actual value of financed equipment was sufficient to provide Deere Credit complete security despite misrepresentations of value, and Deere's action in cancelling its dealership was actually in retaliation for selling outside his misrepresentations of value, and Deere's action in cancelling its dealership was actually in retaliation for selling outside his designated sales area.

After a jury returned a verdict in favor of Crosthwait, the district court granted Deere's motion for judgment as a matter of law as to these claims, but denied its motion for judgment as a matter of law or a new trial on Deere's counterclaim.

II.

Crosthwait contends on appeal that, under Mississippi law, there was insufficient evidence showing deliberate misrepresentation of material facts and actual damages; and there was sufficient evidence of improper motive on Deere's part in terminating the dealership to constitute an affirmative defense to fraud.

[1-3] We use the same standard of review that guided the trial court in its ruling for judgment as a matter of law. *Normand v. Research Institute of America, Inc.*, 927 F. 2d 857, 859 (5th Cir. 1991) (quoting *Boeing Co. v. Shipman*, 411 F. 2d 365, 374-75 (5th Cir 1969)(en banc)). All the evidence with all reasonable inferences is considered in the light most favorable to the party opposed to the motion. If the facts and the inferences point so strongly and overwhelmingly in favor of one party that we believe reasonable jurors could not arrive at a contrary verdict, then the motion was properly granted. If there is substantial evidence opposed to the motion - that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might reach different conclusions - then the motion should have been denied. *Id.*

[4] To prove fraud under Mississippi law, Deere has the burden of showing by clear and convincing evidence that Crosthwait:

1. knowingly made;

2. false;

3. material;

4. misrepresentations to Deere or Deere Credit;

5. which Crosthwait intended to induce action on the part of Deere or Deere Credit in the manner reasonably contemplated;

6. that Deere or Deere Credit did not know the falsity of Crosthwait's representations;

7. that Deere or Deere Credit relied upon the truth of the representations;

8. that it had the right to do so; and

9. that it suffered consequent and proximate injury.

*See Vogel v. American Warranty Home Services Corp.*, 695 F.2d 877 (5th Cir. 1983); *Beck Enterprises, Inc. v. Hester*, 512 So. 2d 672, 675 (Miss. 1987).

[5] The record below provides overwhelming evidence that the sales and credit documents prepared by Crosthwait on its customers' behalf for submission to Deere contained false information which the customers did not supply or create, which were deliberate and material and upon which Deere

detrimentally relied.

Crosthwait customers needed favorable financial data before Deere Credit Services would approve the credit they needed to finance purchases. This credit allowed Crosthwait to sell its equipment to customers; and, in turn, a portion of the credit funds would be released to Crosthwait as an incentive to place a borrower with Deere Credit Services.

Allen Crosthwait admitted he personally submitted documents to Deere which he knew contained false information. Because Deere relied on these misrepresentations in the course of their sales and credit transactions, these misrepresentations were material. Mr. Al Berzett, manager of Agricultural Finance for Deere Credit Services, testified that the credit information, as supplied by the dealers, helped Deere Credit Services determine whether it would give credit for the purchase. Thus, when the dealer gives this information, it intends to induce reliance and a particular action on the part of Deere and Deere Credit as a consequence of these misrepresentations. Since these representations were false, Deere Credit was not in a position to make an informed decision as to the credit-worthiness of its applications, and was therefore ignorant of the applicants' true credit worthiness. The trial court found that, as a result of these misrepresentations, Deere suffered at least $2000 in damages; and, were it not for the honesty of Crosthwait's customers, would have suffered more.

Deere cancelled Crosthwait's dealership under the terms of its agreements with Crosthwait. The "John Deere Agricultural Dealer Agreement" (Agricultural Agreement) and the "John Deere Consumer Products Dealer Agreement" (Consumer Agreement) gave Deere the right to cancel its dealership appointment with Crosthwait by giving notice "at any time" upon default by Crosthwait, defined, *inter alia*, as "[t]he falsification of records, contracts reports or any other documents which the Dealer has submitted to the Company, its affiliates or

assignees". Consumer Agreement §§ 3(c), 10(a); Agricultural Agreement, § 2(d).

The terms of the agreements are clear and unambiguous. As the trial court properly gave the language of the agreements its plain meaning and construction, *Continental Cas. Co. v. Hester*, 360 So. 2d 695, 696 (Miss. 1978), it correctly concluded that Deere lawfully ended Crosthwait's dealership.

B.

[6] At oral argument, Crosthwait introduced the novel idea that "bad faith" on the part of Deere in terminating Crosthwait's dealership constituted an affirmative defense under Mississippi law. This argument is predicated on a showing that Deere cancelled Crosthwait's dealership in retaliation for its selling outside its designated area. The trial court found that the evidence offered, a notation by a Deere employee on an inter-office memo, was not enough to raise a jury issue under the standard set in *Boeing*, *supra*. Applying the same standard, we agree.

III.

[7] Having held that the trial court was correct in finding that Deere lawfully terminated Crosthwait's dealership pursuant to its contract under Mississippi law, it follows that Crosthwait is not entitled under that law to an award for emotional distress, *Fuselier, Ott and McKee, P.A. v. Moeller*, 507 So. 2d 63, 69 (Miss. 1987) (contractual right to terminate precludes award absent malice); or for intentional interference with new and used sales, *Johnson v. Warnaco, Inc.*, 426 F. Supp. 44, 47 (S.D. Miss. 1976) (exercise of "privileged" right interfering with contract is not wrongful).

IV.

[8] Crosthwait claims that, as Deere terminated its dealership without notice, it was entitled to damages under the Mississippi

Franchise Cancellation Statute. Miss. Code Ann. § 75-24-51(6) (1972). While it is arguable that John Deere and Crosthwait qualify as franchisor/franchisee under the statute,[4] ninety-day notice prior to termination is not required when fraud is the basis of termination.[5]

The evidence is clear in showing that Crosthwait was terminated by Deere for having submitted fraudulent sales and credit contracts to Deere and Deere Credit. In addition, Crosthwait was allowed by the trial court, in deference to Mississippi law, to continue its day-to-day operations for ninety days after it was notified by Deere that it was being terminated as a dealer. In sum, even if the relationship between the parties was that of franchisor/franchisee, Deere did not violate the ninety-day statute.

4. " 'Franchise' means an arrangement for a definite or indefinite period in which a person for a consideration grants to another person a license to use a trade name, trademark, service mark, or related characteristic, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise." Miss. Code Ann. § 75-24-51(6) (1972). Consideration is the only element in the definition of "franchise" that may not be clearly met. Mississippi does not necessarily require any sort of "payments" as consideration for a franchise. Some commentators indicate that any good consideration is equivalent to a "franchise fee" under Mississippi law. Kennet H. Slade, *Applicability of Franchise and Business Opportunity Laws to Distribution and Licensing Agreements*. 15 Am.Intell.Prop.L.J. 1 (1987).

5. "No person who has granted a franchise to another person shall cancel or otherwise terminate any such franchise agreement without notifying such person of the cancellation, termination, or failure to renew in writing at least ninety (90) days in advance of the cancellation, termination, or failure to renew, except that when... fraud... of the franchise... is the basis of grounds of cancellation or termination, the ninety-day notice shall not be required." Miss. Code Ann. § 74-24-53 (1972).

V.

[9] We agree with Deere that the trial court incorrectly denied its motion for judgment as a matter of law or a new trial as to Crosthwait's liability to Deere for actual damages, attorney's fees, and costs.

Disputes relative to the specific amounts that may be owed to Deere, noted by the court below, do not negate uncontradicted evidence of losses sustained. Ruth Crosthwait, Crosthwait's bookkeeper, testified that Crosthwait received a statement in 1990 indicating that it owed Deere $624, 914, but that she unilaterally decided not to pay. This debt is undisputed and falls within Mississippi's definition of "account stated." *Hamilton v. Miller*, 217 Miss. 316, 64 So. 2d 147, 149 (1953).[6]

Since the trial court did not distinguish between disputed and undisputed debts, and as specific amounts constitute a question of fact, we REVERSE and REMAND this portion of the case for a reconsideration of the debts owed to Deere.

The action of the district court in granting judgment for Deere is AFFIRMED; the action of the district court in failing to grant Deere judgment as a matter of law on its counterclaim for Crosthwait's liability is REVERSED and the issue is REMANDED for trial.

6. "An account stated may be defined, broadly, as an agreement between the parties to an account based upon prior transactions between them, with respect to the correctness of the separate items composing the account, and the balance, if any, in favor of one or the other.... [A]n account stated properly exists only where accounts have been examined and the balance admitted as the true balance between the parties."

NO.:

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CROSTHWAIT EQUIPMENT COMPANY, INC., A. CURTIS CROSTHWAIT, JR., ALLEN E. CROSTHWAIT and RUTH CROSTHWAIT,

Petitioners,

VERSUS

JOHN DEERE COMPANY,

Respondent.

---

**APPENDIX B**

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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NO. 92-7181

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CROSTHWAIT EQUIPMENT CO., INC., ET AL.,

Plaintiffs,

CROSTHWAIT EQUIPMENT CO., INC.,
A. CURTIS CROSTHWAIT, JR. and RUTH A. CROSTHWAIT,

Plaintiffs-Counter Defendants-
Appellants-Cross Appellees,

and

ALLEN E. CROSTHWAIT,

Plaintiff-Appellant,

versus

JOHN DEERE COMPANY, ET AL.,

Defendants,

JOHN DEERE COMPANY,

Defendant-Counter Claimant-
Appellee-Cross Appellant.

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Appeals from the United States District Court for the
Northern District of Mississippi

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**ON PETITION FOR REHEARING**

(June 30, 1993)

Before KING and EMILIO M. GARZA, Circuit Judges and COBB*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

*District Judge of the Eastern District of Texas, sitting by designation.

REHG- 4

Supreme Court, U.S.
FILED
NOV 8 1993
OFFICE OF THE CLERK

No. 93-491

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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CROSTHWAIT EQUIPMENT COMPANY, INC., A. CURTIS CROSTHWAIT, JR., ALLEN E. CROSTHWAIT AND RUTH A. CROSTHWAIT,

*Petitioners,*

*v.*

JOHN DEERE COMPANY,

*Respondent.*

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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BEST AVAILABLE COPY

## QUESTIONS PRESENTED

1. Whether this Court should exercise its discretion to grant certiorari to review whether the Courts of Appeals of the various circuits substantively differ in their application of Fed. R. Civ. P. 50(a)(1) when each of the Courts of Appeals apply the proper standard and reach similar results even though they use slightly different terminology in articulating the standard to be applied when considering motions for judgment as a matter of law.

2. Whether this Court should exercise its discretion to grant certiorari to review whether the granting of a Fed. R. Civ. P. 50(a)(1) motion for judgment as a matter of law violates a party's Seventh Amendment right to trial by jury where the district court considers all the evidence in the light most favorable to the non-moving party.

## LIST OF PARTIES

The following is a list of all parties to the proceeding in the court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Crosthwait Equipment Company, Inc., Plaintiff-Appellant, Cross-Appellee

2. A. Curtis Crosthwait, Jr., Plaintiff-Appellant, Cross-Appellee

3. Allen E. Crosthwait, Plaintiff-Appellant

4. Ruth A. Crosthwait, Plaintiff-Appellant, Cross-Appellee

5. John Deere Company, Defendant-Appellee, Cross-Appellant, a wholly owned subsidiary of Deere & Company

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No. 93-491

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

CROSTHWAIT EQUIPMENT COMPANY, INC., A. CURTIS CROSTHWAIT, JR., ALLEN E. CROSTHWAIT AND RUTH A. CROSTHWAIT,

*Petitioners,*

*v.*

JOHN DEERE COMPANY,

*Respondent.*

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

## STATEMENT OF THE CASE

A comprehensive and accurate statement of the facts and prior proceedings in this case is set forth in the Fifth Circuit's opinion reported at 992 F.2d 525 (5th Cir. 1993).

Petitioner, Crosthwait Equipment Company, Inc., formerly an authorized Deere dealership in Mississippi,[1] brought this action in a Mississippi state court alleging that respondent had wrongfully terminated the farm equipment dealership. The case

[1] Crosthwait Equipment Company, Inc. was owned and operated by A. Curtis Crosthwait, Ruth A. Crosthwait, and Allen E. Crosthwait (collectively "petitioners").

*(footnote continues)*

was removed to the United States District Court for the Northern District of Mississippi. Respondent presented uncontroverted evidence at trial which established that the dealership was terminated pursuant to the terms of the dealership agreement because petitioners submitted fraudulent sales and credit documents to respondent. Specifically, respondent produced twenty-one of petitioners' former customers who testified without contradiction that documents submitted to respondent by petitioner contained falsifications and misleading information regarding various aspects of transactions involving petitioners and their customers. The false and misleading information included inflated down payments, incorrect purchase price information and fictitious equipment listed as trade-ins. 992 F.2d at 527. Moreover, uncontroverted evidence established that the serial numbers on equipment had been altered by petitioners. *Id.* Petitioner Allen Crosthwait even acknowledged that falsified sales and credit documents had been submitted to respondent. *Id.* Notwithstanding the uncontroverted evidence, however, petitioners argued that respondent wrongfully terminated the dealership and that the reason for termination went beyond the terms of the dealership agreement. *Id.*

The jury returned a verdict in favor of petitioners. The district court subsequently granted respondent's motion for judgment as a matter of law.[2] Fed. R. Civ. P. 50(a)(1).

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*(footnote continued)*

Petitioners refer to themselves as "franchisees of the John Deere Company." The Fifth Circuit did not find that a franchisee/franchisor relationship existed between petitioners and respondent and respondent disputes that such a relationship existed between the parties. This Court need not characterize the relationship. It is sufficient for purposes of this Court's considerations that the relationship is governed by contract, specifically the dealership agreement between the parties.

[2] Respondent counterclaimed for the unpaid balance due on an account after termination of the dealership. This issue is irrelevant for purposes of this petition and will be referred to only incidentally. The district court denied resondent's motion for judgment as a matter of law or new trial on respondent's counterclaim.

The Fifth Circuit affirmed the district court utilizing the same standard as the district court in determining whether to uphold the granting of respondent's motion for judgment as a matter of law. The Fifth Circuit stated, "[t]he record below provides overwhelming evidence that the sales and credit documents prepared by Crosthwait on its customers' behalf for submission to Deere contained false information which the customers did not supply or create, which were deliberate and material and upon which Deere detrimentally relied." 992 F.2d at 528. The Fifth Circuit concluded, as had the district court, that notwithstanding the jury verdict for petitioners, a motion for judgment as a matter of law must be granted when the evidence, with all reasonable inferences considered in the light most favorable to petitioners, pointed "so strongly and overwhelmingly in favor of [respondent] that . . . reasonable jurors could not arrive at a contrary verdict. *Id.*

Accordingly, the district court's judgment as a matter of law under the standard enumerated was appropriate and consistent with Fed. R. Civ. P. 50(a)(1).[3] The Fifth Circuit denied a petition for rehearing without opinion.

## SUMMARY OF THE ARGUMENT

The Supreme Court grants writs of certiorari in cases of great importance which involve conflicts between the circuits or some significant issue with respect to the Constitution or the laws of the United States. None of these factors are present in this case. Although petitioners claim Fed. R. Civ. P. 50(a)(1) is being inconsistently applied in the various circuits, petitioners' argument is based solely on semantics. The utilization of different terminology to articulate the standard set forth in Fed. R. Civ. P. 50(a)(1) does not create a split between the circuits. Moreover, contrary to petitioners' argument, the granting of a Fed R. Civ. P. 50(a)(1) motion for judgment as a matter of law does not violate

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[3] As to respondent's counterclaim, the Fifth Circuit reversed the district court's denial of respondent's motion for judgment as a matter of law and remanded the case for retrial of the issues raised by the counterclaim.

petitioners' Seventh Amendment rights. Finally, an "any evidence" standard has never been used in determining whether to grant a Fed. R. Civ. P. 50(a)(1) motion for judgment as a matter of law. Rather, the evidence has always been viewed in the light most favorable to the nonmoving party prior to any determination as to whether there is a legally sufficient evidentiary basis for a jury to have found for the nonmoving party. A mere scintilla of evidence in favor of the nonmoving party has never been enough to sustain a verdict against a Fed. R. Civ. P. 50(a)(1) motion.

## REASONS FOR DENYING THE WRIT OF CERTIORARI

### I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI BECAUSE THERE EXISTS NO SPLIT IN THE CIRCUITS WITH RESPECT TO THE APPLICATION OF FED. R. CIV. P. 50(a)(1)

Decisions of the Courts of Appeals are in conflict only when one circuit, when presented with the same facts and evidence and applying the same law, would decide the case differently from another circuit. Petitioners argue that a conflict exists among the circuits in determining whether to grant a motion for judgment as a matter of law under Fed. R. Civ. P. 50(a)(1). Petitioners argue that because the various circuits rely on different terminology to articulate the applicable standard, outcomes may be inconsistent. Fed. R. Civ. P. 50(a)(1), and the case law and commentary which address it, reveal that no conflict exists between the circuits with respect to the application of the standard governing motions for judgment as a matter of law.

In 1991, Fed. R. Civ. P. 50(a)(1) was amended.[4] Had this Court felt a long-standing split existed between the circuits with

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[4] Fed. R. Civ. P. 50(a)(1) now states, "If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with

*(footnote continues)*

regard to the standard for granting motions for judgment as a matter of law, the preferred standard could have been articulated when this Court adopted the 1991 amendment. As noted by the Advisory Committee, however, the amended rule "articulates the standard for the granting of a motion for judgment as a matter of law. It effects no change in the existing standard. That existing standard was not expressed in the former rule, but was articulated in long-standing case law." Fed. R. Civ. P. 50 Advisory Committee's Note.

The applicable standard under Fed. R. Civ. P. 50(a)(1), approved by this Court, requires a finding of "no legally sufficient evidentiary basis" in order for a court to grant a motion for judgment as a matter of law. The standard is the same for all circuits. While the various circuits may use various terms to characterize their application of the uniform standard, it does not follow that the circuits are applying a conflicting standard. By not making the criteria applicable in Fed. R. Civ. P. 50(a)(1) more explicit in 1991, the Court accepted the application of the standard found in the preexisitng case law of the various circuits. This Court has a particularly strong interest in having the standard applied appropriately and consistently by the various circuits

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*(footnote continued)*

respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, crossclaim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue."

Prior to the 1991 amendment, Fed. R. Civ. P. 50 (1987) stated, "(b) Motion for Judgment Notwithstanding the Verdict. . . . Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. . . . If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

because of Seventh Amendment considerations. Both the wording of Fed. R. Civ. P. 50(a)(1) and the Advisory Committee's Notes reaffirm this Court's approval of the previous applications of the standard by the various circuits.

The only Supreme Court authority relied upon by petitioners to substantiate a split between the circuits is Justice White's dissent in *Schwimmer v. Sony Corp. of Am.*, 459 U.S. 1007 (1982). Not only did the Court deny the writ of certiorari in *Schwimmer* in 1982, but the Court has not subsequently adopted the views expressed in Justice White's dissent, as demonstrated by the fact that the Court did not articulate a more specific standard at the time of the 1991 amendment to Fed. R. Civ. P. 50(a)(1). There is no reason for this Court to reconsider its earlier decisions and actions respecting Fed. R. Civ. P. 50(a)(1).

The standard used by the district court and Fifth Circuit in this case was initially articulated in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) as follows: "On motions for . . . judgment notwithstanding the verdict [now called motion for judgment as a matter of law in Fed. R. Civ. P. 50(a)(1)] the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion." *Id.* at 374. The expression of the standard as applied in *Boeing* has consistently been cited in the Fifth Circuit. *See Conaway v. Control Data Corp.*, 955 F.2d 358 (5th Cir.), *cert. denied*, 113 S. Ct. 186 (1992); *General Motors Acceptance Corp. v. Bates*, 954 F.2d 1081 (5th Cir. 1992).

Petitioners rely on certain decisions from the Seventh, Eighth, and Ninth Circuits in an effort to create a split between the circuits. A review of the authorities relied upon by petitioners, however, indicates the Seventh, Eighth, and Ninth Circuits utilize the same standard applied in *Boeing*.

Two of the cases cited by petitioners address the issue in terms of actions brought under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (hereinafter "FELA"): *Casko v. Elgin, J. &*

*E. Ry.*, 361 F.2d 748 (7th Cir. 1966) and *Kingston v. McGrath*, 232 F.2d 495 (9th Cir. 1956). In *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), this Court enunciated a standard applicable in FELA cases which, on its face, seems to differ with *Boeing* in that only the non-moving party's evidence is to be considered in FELA cases. *Boeing*, however, distinguished FELA and non-FELA cases.

> The Court should consider *all* of the evidence and not just that evidence which supports the non-mover's case. The Supreme Court in *Wilkerson v. McCarthy*, an FELA case, held that all the evidence should not be considered in a motion for a directed verdict [or a motion for judgment as a matter of law]. However, the Courts of Appeals have tended to reach the conclusion that all the evidence should be considered, 'distinguishing *Wilkerson* on the ground that FELA cases are sui generis.' . . . The evidence must be considered in the light and with all reasonable inferences most favorable to the party opposed to the motion.

411 F.2d at 375 n.16 (quoting 5 James W. Moore et al., *Moore's Federal Practice*, paragraph 50.02[1] (2d ed. 1968)) (citation omitted).[5]

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[5] *See generally Boeing*, 411 F.2d at 375 n.16 for cases agreeing with this distinction. In *Runnings v. Ford Motor Co.*, 461 F.2d 1145 (9th Cir. 1972), the Ninth Circuit stated, "On such a motion [under former Fed. R. Civ. P. 50(a)] the question before the trial court is whether the evidence *in its entirety* would rationally support a verdict for the plaintiff [non-moving party], assuming the jury took a view of the evidence most favorable to plaintiff." *Id.* at 1147 (emphasis added). This lends further support to a distinct difference in FELA, non-FELA standards for granting Fed. R. Civ. P. 50(a)(1) motions since the Ninth Circuit applied the *Wilkerson* standard in *Kingston*, 232 F.2d 495 (9th Cir. 1956), a case cited by petitioner.

Moreover, even the application of *Wilkerson* in the context of FELA cases has been criticized.

*(footnote continues)*

Commentators have uniformly criticized any standard which confines consideration to only those portions of the record which favor the non-moving party. Professor Edward H. Cooper has commented,

> it seems clear that it would be absurd to apply literally a rule requiring consideration of only the parts of the evidence favorable to the party opposing a directed verdict motion, that most courts have recognized the logic of considering parts of the evidence unfavorable to that party, and that nothing in *Wilkerson* require[s] a different approach.

Cooper at 952.[6]

Other cases cited by petitioners fail to establish a split in the circuits over this issue. In *Simpson v. Skelly Oil Co.*, 371 F.2d 563 (8th Cir. 1967), the Eighth Circuit stated that when presented with a motion for judgment as a matter of law,

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*(footnote continued)*

> The most important reason for disregarding the literal sweep of the Court's statement in *Wilkerson* is that the Court [in *Wilkerson*] was not faced with any unfavorable evidence of a sort which the jury should be compelled to believe. . . . The Court's statement that consideration should be given only to the favorable evidence is thus an accurate response to the needs of the case before it, and it need not mean that the same approach is appropriate when there is unfavorable evidence which a jury should not be allowed to ignore.

Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903, 948-949 (1971).

[6] The authoritativeness of Professor Cooper's interpretation is reflected by the Advisory Committee's Note to the 1991 amendment of Fed. R. Civ. P. 50(a)(1) where the Committee cites Professor Cooper's article after stating that, "the standard for granting a motion for judgment as a matter of law .... was not expressed in the former rule, but was articulated in long-standing case law."

> it is [the judge's] duty to accept the plaintiff's version as true for the purposes of the motion, notwithstanding the existence of strong testimony to the contrary; the judge is not concerned with the weight of the evidence.... The standard ... is whether plaintiff's evidence is sufficient to support a burden, ignoring defendant's evidence.

*Id.* at 567. This, in essence, says the same thing as *Boeing*, except that different terminology is used by the Eighth Circuit. Although *Boeing* says a district court presented with a Fed. R. Civ. P. 50(a)(1) motion must refer to "all evidence," the caveat is added that all evidence is considered only to the extent that it supports the non-moving party.[7]

Petitioners also rely on *Lyons v. J.C. Penney Co.*, 316 F.2d 753 (7th Cir. 1963) where the Seventh Circuit stated, "[w]e consider ... only the evidence favorable to plaintiff [the non-moving party in this instance] and draw the inferences most strongly in her favor." *Id.* at 753. Again, there is no conflict with *Boeing* and the Fifth Circuit.

Similarly, in *Caudill v. Farmland Indus., Inc.*, 919 F.2d 83 (8th Cir. 1990), relied upon by petitioners, the Eighth Circuit stated that, "only evidence favoring the non-moving party should be considered." *Id.* at 86. This is consistent with *Boeing*'s statement and application of the Fed. R. Civ. P. 50(a)(1) standard. In further support of the accord between the circuits, the Eighth Circuit cited *Dace v. ACF Indus., Inc.*, 722 F.2d 374 (8th Cir. 1983), *adhered to as supplemented*, 728 F.2d 976 (8th Cir. 1984) for the proposition that the movant's evidence which "is completely disinterested, uncontradicted, and unimpeached" may be considered by the court in making its determination. *Id.* at 377 n.6. *Boeing* endorses the same concept by permitting the district court to

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[7] "[I]n the light and with all reasonable inferences *most favorable to the party opposed to the motion.*" *Boeing*, 411 F.2d at 374 (emphasis added).

consider all the evidence, but only in the light most favorable to the non-moving party.

Moreover, even in circuits where petitioners claim the standard differs from *Boeing* there are decisions that cite *Boeing* as articulating the proper application of Fed. R. Civ. P. 50(a)(1). *See Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 513 (7th Cir. 1986); *J.E.K. Indus., Inc. v. Shoemaker*, 763 F.2d 348, 353 (8th Cir. 1985); *LaMontagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984); *Autohaus Brugger, Inc., v. Saab Motors, Inc.*, 567 F.2d 901, 909 (9th Cir.), *cert. denied*, 436 U.S. 946 (1978); *United Cal. Bank v. THC Fin. Corp.*, 557 F.2d 1351, 1356 (9th Cir. 1977).

In sum, while *Boeing* permits all of the evidence to be considered, it qualifies the statement by requiring that all reasonable inferences be drawn in favor of the non-moving party and that the evidence be viewed only in the light most favorable to the non-moving party. Whether the standard is articulated as a review of all of the evidence in the light most favorable to the non-moving party or as a review of only the evidence favorable to the non-moving party, the result is the same — the non-moving party gets every benefit of the doubt. The position advanced on behalf of petitioners constitutes nothing more than a distinction without a difference. There is no split between the circuits with respect to Fed. R. Civ. P. 50(a)(1). The standards used in the Seventh, Eighth, and Ninth Circuits do not conflict with *Boeing* and the Fifth Circuit.

## II. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI BECAUSE THERE EXISTS NO VIOLATION OF PETITIONERS' SEVENTH AMENDMENT RIGHTS

The granting of a Fed. R. Civ. P. 50(a)(1) motion for judgment as a matter of law does not violate petitioners' Seventh Amendment rights. *Galloway v. United States*, 319 U.S. 372 (1943). Granting a motion for judgment as a matter of law using the

standard enunciated in Fed. R. Civ. P. 50(a)(1), "is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment ...." Fed. R. Civ. P. 50 Advisory Committee's Note. As this Court has stated on several occasions, "it is settled that Rule 50(b) [now Fed. R. Civ. P. 50(a)(1)] does not violate the Seventh Amendment's guarantee of a jury trial." *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1967) (citing *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940)). *See also Galloway*, 319 U.S. 372 (1943).

Petitioners argue that the Fifth Circuit denied their Seventh Amendment right to jury trial by using the standard in *Boeing*, but they do not make a similar argument with regard to the criteria used in the Seventh, Eighth, and Ninth Circuits. As previously discussed, however, the operative standard is the same in all the circuits. Petitioners are merely upset at the application of the standard to the facts of their case. Nevertheless, the same result would have been reached in any other circuit, and there has been no violation of petitioners' Seventh Amendment rights.

## III. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI BECAUSE THE ANY EVIDENCE STANDARD PROPOSED BY PETITIONERS IS ANALOGOUS TO THE SCINTILLA RULE REJECTED BY THIS COURT

Petitioners propose a criteria with respect to Fed. R. Civ. P. 50(a)(1) motions that would preclude granting the motion if there is any evidence that supports the verdict. Such a standard, however, constitutes nothing more than a restatement of the "scintilla rule." In fact, petitioners utilize the word "scintilla" in formulating their proposed standard. The scintilla rule has long been rejected in federal courts.

> The rule is settled for the federal courts ... that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the

> judge to direct the jury to find according to the views of the court.... The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned.

*Pennsylvania R.R. v. Chamberlain*, 288 U.S. 333, 343 (1933). *See also Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943) (rejecting the scintilla rule even in FELA cases).

## CONCLUSION

For the foregoing reasons, John Deere Company respectfully urges that the petition for a writ of certiorari be denied

Respectfully submitted this 8th day of November, 1993.

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